Supreme Court, U.S.
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No. 02-1065

IN THE

Supreme Court of the United States

STEVE MAY,

Petitioner,

v.

JANICE BREWER, as Secretary of State of the State of Arizona, acting in her official capacity; DAVID PETERSON, as Treasurer of the State of Arizona, acting in his official capacity; the CLEAN ELECTIONS COMMISSION; and ARIZONANS FOR CLEAN ELECTIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION FOR RESPONDENT ARIZONANS FOR CLEAN ELECTIONS

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QUESTION PRESENTED

May a State, consistent with the First Amendment, designate revenues from a specific tax to fund an otherwise constitutional and viewpoint-neutral public campaign finance system?

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28 U.S.C. § 1341 3

Other Authorities:

Arizona State Legislature, John Huppenthal, *at*
http://www.azleg.state.az.us/MembersPage.asp?
Member_ID=59 (last visited Feb. 11, 2002) 10

Authorities Cited

Citizens Clean Elections Commission, General Election – Candidate Listing by Office, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/rptListAllCandGenSubs2002.asp (last visited Feb. 11, 2002) 10

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STATEMENT OF THE CASE

At its heart, this case is about the authority of a State to tax non-expressive conduct–a subject on which there is no split of authority. Petitioner concedes that Arizona's "Clean Money/Clean Elections" system of public campaign finance would be constitutional if funded out of general revenues. He contends, however, that the system cannot constitutionally be financed in part from a surcharge on fines and penalties, such as the parking ticket that Petitioner has refused to pay in full.

Petitioner seeks to have this Court gut a constitutional campaign finance system by depriving it of funding. No court outside Arizona has addressed, let alone struck down, a funding mechanism like the one at issue here, so there is no conflict to be resolved by this Court. Nor does this case present any important federal question that this Court's precedents do not fully resolve–consistently with the decision of the Arizona Supreme Court.

Statutory Background

In 1998, the voters of Arizona enacted the Citizens Clean Election Act (the "Act") via ballot initiative. The Act was intended to "create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions." Ariz. Rev. Stat. § 16-940. The Act establishes a Citizens Clean Elections Commission, which distributes money to qualifying candidates from a Clean Elections Fund. Candidates must collect a requisite number of five-dollar contributions in order to qualify; no candidates are forced to participate in the Clean Elections system. *See* Ariz. Rev. Stat. § 16-950.

The Act has been well received by both candidates and voters. In 2000, the first election year in which the Clean Elections system was in effect, 59 candidates participated. Citizens Clean Elections Commission, 2000 CCEC Fact Sheet, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/ey2000factsheet.asp (last visited Feb. 11, 2002). In 2002, 139 candidates–more than half of the candidates, including both incumbents and challengers, Democrats and Republicans–participated. Citizens Clean Elections Commission, 2002 Clean Elections Results in Arizona, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/ey2002factsheet.asp (last visited Feb. 11, 2002). A recent opinion poll found that 64 percent of Arizonans believe that the Clean Elections funds have had a positive impact on Arizona elections. *Id.* Although the Act is still young, preliminary evidence indicates that Clean Elections funding has increased competition by increasing the number of contested races.

The Clean Elections Fund receives its funding from three sources: (1) a $5 state income tax check-off; (2) a tax credit for contributions to the Fund up to $500 or 20 percent of taxes owed, whichever is greater; and (3) a 10 percent surcharge on criminal and civil fines. Ariz. Rev. Stat. § 16-954(A)-(C). The 10 percent surcharge, which is the only provision at issue in this case, supplies 68 percent of the Fund's revenue. The Act originally also required lobbyists for for-profit organizations to pay a $100 registration fee, but that provision was invalidated by the trial court, was not appealed, and is no longer part of this case. *See May v. McNally*, 55 P.3d 768, 770 (Ariz. 2002).[1]

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[1]Petitioner's repeated references to the lobbyist registration fee are a transparent effort to confuse the issues in this case by implying that the provisions that the state courts upheld are similar to the provisions that were invalidated. The lobbyist fee is a distraction: it is no longer in force and was never an important part of the statute. Even when it was in force, the

Procedural History

Petitioner, a member of the Arizona legislature at the time he filed suit, received a parking ticket for $27 in 1999. He refused to pay the less than $3 surcharge required by the Act and filed suit in federal court. The district court concluded, however, that the surcharge was a tax and dismissed the complaint for lack of subject matter jurisdiction under the Tax Injunction Act. *Lavis v. Bayless*, 233 F. Supp. 2d 1217 (D. Ariz. 2001) (citing 28 U.S.C. § 1341).

Petitioner refiled in state court. Petitioner did not challenge the constitutionality of the Act itself, but only two of its sources of revenue: the lobbyist registration fee and the surcharge. As noted earlier, the trial court invalidated the lobbyist registration fee, and that decision was not appealed. Ultimately, the Arizona Supreme Court upheld the surcharge, and Petitioner now seeks review only of that decision.[2]

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lobbyist registration fee produced less than two percent of the Fund's revenue. Citizens Clean Elections Commission, 2000 CCEC Fact Sheet, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/ey2000factsheet.asp (last visited Feb. 11, 2002).

[2]The state court procedural history is adequately described in the Petition. But Petitioner's suggestion that the State did not defend the case is misleading. Throughout this litigation, the Arizona Attorney General's Office has represented the Citizens Clean Elections Commission in defense of the statute, presenting the State's position to the courts. The decision of two largely nominal officials to leave the defense to the Attorney General says nothing about their views on the merits of Petitioner's claims.

ARGUMENT

I.

THE ARIZONA SUPREME COURT'S DECISION CREATES NO CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR OF FEDERAL CIRCUIT COURTS.

Petitioner strains to identify a split among state supreme courts. In reality, the few state courts that have considered constitutional challenges to the means of funding public campaign financing systems have reached consistent outcomes: taxes on speech have been invalidated, and assessments that do not tax or otherwise specially burden speech have been upheld. Taxes that uniquely burden the exercise of First Amendment rights are invalid because of their restraining effect on protected activity. *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 586-88 (1983) (invalidating tax on ink and paper that only applied to large newspapers). Generally applicable assessments, such as Arizona's 10 percent surcharge, do not implicate First Amendment rights and are therefore permitted by the Constitution.

Butterworth v. Republican Party of Florida, 604 So. 2d 477 (Fla. 1992), cited by Petitioner, not only fails to conflict with the decision of the Arizona Supreme Court but is a straightforward application of these principles. To finance Florida's public funding system, the law challenged in *Butterworth* imposed a 1.5 percent assessment on all monetary contributions to political party executive committees and political committees. *Id.* at 479. The Florida Supreme Court acknowledged that publicly funding candidates serves the compelling interests of preserving the integrity of the election process and removing corruption and the appearance of corruption from politics. The court held, however, that

"singling out political parties and associations to support the fund" violated the First Amendment. *Id.* at 480. *Butterworth* thus depended on Florida's decision to tax activities protected by the First Amendment; the Florida court noted that the expenditures could permissibly have been funded by "supporting the fund through general revenues." *Id.*

The only other case in which Petitioner claims to find a conflict with the Arizona Supreme Court's decision actually came to the same result as the Arizona courts on nearly the same facts. In *Vermont Society of Ass'n Executives v. Milne*, the Vermont Supreme Court invalidated a five percent tax on lobbying expenditures over $2,500, just as the Arizona trial court invalidated a $100 fee on lobbyists in this case. 779 A.2d 20 (Vt. 2001). The Vermont court's analysis focused on whether the tax on lobbying was merely an extension of the general sales tax to include lobbying, in which case it would be permissible, or was a tax that singled out First Amendment activity. Concluding that the lobbying tax targeted protected First Amendment activity and was not a general tax, the Vermont court invalidated the tax. Nothing in the Vermont decision even remotely conflicts with the decision below; indeed, as noted, the trial court invalidated Arizona's $100 fee on lobbyists, and Respondents did not appeal that decision.

The funding mechanism challenged here differs fundamentally from the systems at issue in *Butterworth* and *Milne*. Whereas both of those cases dealt with taxes on First Amendment activity, Arizona's decision to increase civil and criminal fines does not implicate the First Amendment. As the Arizona Supreme Court noted, "The opportunity to commit a crime or park illegally is not deserving of the same protection as is the opportunity to participate in lawful activity. . . ." *May*, 55 P.3d at 771.

Petitioner does not even pretend to find a conflict between *May* and federal circuit court opinions. He argues that *Libertarian Party of Indiana v. Packard*, 741 F.3d 981 (7th Cir. 1984), which upheld a general fee to promote political speech through viewpoint-neutral grants, conflicts with *Butterworth* and *Milne*, but does not claim that *Packard* conflicts with *May*. Of course, for the same reason that *May* does not conflict with *Butterworth* and *Milne*, *Packard* does not either: *Butterworth* and *Milne* invalidated taxes on speech, whereas *Packard* and *May* upheld general assessments that did not burden speech. The different outcomes with respect to the constitutionality of the taxes in the two sets of cases simply represent the application of clear law to different fact patterns and do not create a split. In any event, even if *Packard* did conflict with *Butterworth* or *Milne*, that would not support granting certiorari in this case, the decision in which is fully consistent with all three cases.

II.

WHEN THE FIRST AMENDMENT IS NOT IMPLICATED, STATES HAVE EXTENSIVE AUTHORITY TO FUND GOVERNMENT PROGRAMS THROUGH WHATEVER TAXATION SYSTEM THEY CHOOSE.

Except for taxes on speech, the funding mechanisms for public financing systems do not implicate the First Amendment. This Court's decision in *Buckley v. Valeo* establishes that the use of general tax revenues to provide public funding for campaigns does not violate the First Amendment rights of taxpayers. 424 U.S. 1, 91-92 (1976) (per curiam). Notwithstanding Petitioner's claim to the contrary, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (holding that teachers could not be required to fund teachers' union speech with which they disagreed), does not control this case. *Abood*

and its progeny address when individuals who are required to join an association may be forced to pay for speech with which they disagree. In the case Petitioner now seeks to bring before this Court, he was not required to join any association. He was merely required to pay a tax used for a State program that he does not support. At bottom, this case may raise questions about the State's tax policy, but it does not implicate the First Amendment.[3]

Because the First Amendment is not implicated here, deference to the State's discretion in setting its own tax policy mandates denial of a writ of certiorari in this case. The States retain extensive flexibility to structure their government operations as they see fit. They are not, for example, bound by the federal requirement of separation of powers. *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). States' autonomy over taxation systems is similarly broad, providing the States with ample authority to tax one group and use the funds to benefit a different group. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-22 (1937). As this Court stated in *Carmichael*:

> [I]f the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid

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[3]While the *Butterworth* court applied *Abood*, it did so in the context of considering the First Amendment impact of conditioning political association on contributing money to candidates that the association does not support. *Butterworth*, 604 So. 2d at 479. This case implicates no such issues, as the Arizona Supreme Court noted when it distinguished *Butterworth*. *May*, 55 P.3d at 773 n.5. Unlike the statute at issue in *Butterworth*, the Act does not put any restrictions on association or other First Amendment activities.

> by being bound to the other in the same act of legislation.

Id.

In practice, States routinely fund specific expenditures with dedicated revenue streams from specific taxes. *See, e.g.*, *Carmichael*, 301 U.S. at 522 n.14 (listing representative examples of specific taxes earmarked for specific expenditures). In addition to financing the Clean Elections Fund, surcharges on fines support emergency medical services and criminal justice programs. Ariz. Rev. Stat. §§ 12-116.01, 12-116.02. The Arizona Tourism and Sports Authority's construction of a new football stadium is financed with surcharges on rental cars and hotel rooms. Ariz. Rev. Stat. §§ 5-839, 5-840. Arizona also funds emergency medical services such as trauma centers with taxes on tobacco, even though trauma usually has nothing to do with the use of tobacco. Ariz. Rev. Stat. § 36-776. Indeed, tobacco taxes fund speech designed to reduce smoking in Arizona. Ariz. Rev. Stat. § 36-772. That some smokers may object to state-financed public education programs attacking their behavior is no more and no less significant than the fact that Petitioner objects to the use of the surcharge on his parking ticket to fund an otherwise constitutional public financing system. As this Court noted in *Buckley*: "The fallacy of [this] argument is apparent: every appropriation . . . uses public money in a manner to which some taxpayers object." *Buckley*, 424 U.S. at 91-92.

Petitioner acknowledges that if Arizona financed the Clean Elections Fund with a general appropriation, it would be constitutional under *Buckley*. (Petition at 7-8.) Under *Buckley* and *Carmichael*, Arizona's decision to fund the system from generally applicable surcharges taxing activities not protected by the First Amendment cannot change that result.

III.

EVEN IF FIRST AMENDMENT CONCERNS ARE IMPLICATED, THE ARIZONA SUPREME COURT CORRECTLY APPLIED *SOUTHWORTH*.

The Arizona Supreme Court correctly determined that any First Amendment issues presented by this case are resolved by applying *Board of Regents v. Southworth*, 529 U.S. 217 (2000). *Southworth* is the only case decided by this Court that addresses viewpoint-neutral programs that encourage speech by creating a limited public forum. Unlike *Southworth*, *Abood* and its progeny (including *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001)), address compelled funding of speech with a single viewpoint. The *Abood* line of cases protects individuals who are compelled to join associations from being forced to support speech with which they disagree. Because the Act does not compel anyone to join any association, and is a viewpoint-neutral effort to promote speech, the Arizona Supreme Court correctly applied *Southworth* in upholding the tax challenged here.

Southworth upheld a system that compelled financing of speech, where the compelled financing served "important and substantial purposes," such as facilitating a wide range of speech in a university setting, and was applied in a viewpoint-neutral way. 529 U.S. at 231, 233-34. Eliminating corruption and the appearance of corruption from political campaigns through public financing are compelling state interests. *See Buckley*, 424 U.S. at 96. Just as *Southworth* serves the important First Amendment value of promoting free and robust speech on a university campus, the Act serves First Amendment interests by using public money to facilitate political speech by a wide range of candidates, including those without wealth, and

by encouraging candidates to run against well-funded incumbents, thus provoking political debate. Consequently, "[t]he proper measure, and the principal standard of protection . . . is the requirement of viewpoint-neutrality in the allocation of funding." *Southworth*, 529 U.S. at 233.

The Citizens Clean Elections Act operates in a manifestly viewpoint-neutral way. Any candidate who receives the requisite number of $5 contributions is entitled to participate in the Clean Elections system, regardless of the candidate's viewpoint, ideology, or party affiliation. Ariz. Rev. Stat. § 16-950. Both Democrats and Republicans have run as Clean Elections candidates; of the 39 participating candidates elected in 2002, 22 were Republicans, and 17 were Democrats. Citizens Clean Elections Commission, 2002 Clean Elections Results in Arizona, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/ey2002factsheet.asp (last visited Feb. 11, 2002).

Petitioner incorrectly contends that the system discriminates against the viewpoint of candidates who oppose public financing. To the contrary, not only may such candidates opt out of the system, but they may also accept Clean Elections Fund money to express precisely that viewpoint: a participating candidate could run on a platform dedicated to dismantling the Clean Elections system. Indeed, Representative John Huppenthal accepted public financing and has sponsored legislation to dismantle the Clean Elections system. *See* Citizens Clean Elections Commission, General Election – Candidate Listing by Office, *at* http://www.ccec.state.az.us/ccecscr/elections/2002/rptListAllCandGenSubs2002.asp (last visited Feb. 11, 2002) (listing Huppenthal as a Clean Elections candidate); Arizona State Legislature, John Huppenthal, *at* http://www.azleg.state.az.us/MembersPage.asp?Member_ID=59 (last visited Feb. 11, 2002) (listing Huppenthal's sponsorship of H.C.R. 2005, which would repeal

the Citizens Clean Elections Act). Viewpoint-neutrality means that all qualifying candidates, regardless of viewpoint, may avail themselves of Clean Election funding. The refusal of some candidates to accept the funds does not render the program viewpoint-based.

Even if this Court eventually decides to provide more guidance on the scope of *Southworth*, this case is not a good vehicle for doing so. *Southworth* is a recent precedent, decided less than three years ago, and the Arizona Supreme Court simply applied its holding to new facts. While an increasing number of States are considering full public financing systems, the number that have implemented such programs is still quite small, and the lower courts have had little opportunity to consider the constitutional implications of these systems and their funding mechanims. If further consideration by this Court is necessary, it will be more fruitful after the issues have had full opportunity to percolate through the State and lower federal courts. This Court can then address any genuine conflicts that may arise, rather than the illusory conflict suggested by Petitioner. In the meantime, the States should be allowed to fill their traditional roles as laboratories of democracy in setting both tax and campaign finance policy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the writ of certiorari.

Dated: February 14, 2003

Respectfully submitted,

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